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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 JAMES MINCOFF,

15 Defendant.

CASE NO. 06cr1241 DMS

**ORDER DENYING
DEFENDANT'S MOTION UNDER
28 U.S.C. § 2255**

[Docket No. 302]

16 This case returns to the Court on Defendant's motion to vacate, set aside, or correct his
17 sentence pursuant to 28 U.S.C. § 2255. The Government has filed a response to the motion, and
18 Defendant has filed a traverse. After reviewing the motion, opposition, traverse, and all supporting
19 documents and the record on file herein, the Court denies the motion.

20 **I.**

21 **BACKGROUND**

22 On June 6, 2006, Defendant James Mincoff, was indicted for conspiracy to distribute cocaine
23 in violation of 21 U.S.C. §§ 841(a)(1) and 846. The indictment also named three other individuals:
24 Juvenal Vega-Soto, Stephen Perry and Jessie Munoz. The indictment was part of a larger
25 investigation of the Mexican Mafia which resulted in five other indictments against numerous other
26 individuals.

27 Munoz was arrested on June 16, 2006. Mincoff turned himself in and was arrested on July 12,
28 2006. Between August 4, 2006, and June 29, 2007, the Government produced approximately 48,000

1 pages of documents and other relevant materials to defendants in each of the related cases. The
2 Government disclosed recordings and transcripts of conversations from wiretaps on phones used by
3 Munoz, including incriminating evidence against Mincoff from several phone calls in late July 2006,
4 and impeachment evidence against Munoz from several phone calls in mid-August 2006.

5 On June 25, 2007, Munoz pled guilty to one count of conspiracy to distribute cocaine in
6 violation of 21 U.S.C. §§ 841(a)(1) and 846. The following day, the Government filed a superseding
7 indictment against Mincoff adding a count for attempted distribution of cocaine and a count for
8 unlawful use of a communication facility in violation of 21 U.S.C. § 843(b).

9 Mincoff's trial started on August 20, 2007. Munoz testified as the "main government witness"
10 at Mincoff's trial. *United States v. Mincoff*, 574 F.3d 1186, 1190 (9th Cir. 2009). On August 23,
11 2007, the jury found Mincoff guilty on all counts. The court subsequently sentenced Mincoff to 240
12 months in prison.

13 After the jury's verdict but before sentencing, the Government disclosed an additional batch
14 of discovery to defendants pending trial in the related cases. Within that discovery was a report
15 authored on February 21, 2006, by Federal Bureau of Investigation ("FBI") Special Agent Allan
16 Vitkosky detailing his meeting with an unidentified individual "in a position to testify." (Mot. to
17 Vacate, Ex. C.) The individual was most likely Munoz. (*Id.*) The report recorded incriminating
18 evidence the individual provided law enforcement against Thomas Durkin, a defendant in a related
19 case. According to the report, Durkin was charged in state court with possession of two ounces of
20 methamphetamine, and he conspired with Munoz to suborn perjury from Ricky Contreras to
21 undermine the state's case against Durkin. Four sentences of the report bore some relation to the
22 conspiracy to suborn perjury:

23 DURKIN also wrote, "RICKY did good . . . did the right thing. I know I'll blow them
24 out of the water in motions." According to the Individual this is a reference to RICKY
25 CONTRERAS, who testified falsely at the Preliminary Hearing (sic) that the
26 methamphetamine belonged to him and not DURKIN. (Intercepted conversations
indicated that DURKIN and JESSIE MUNOZ elicited the false / perjured testimony of
RICKY CONTRERAS on behalf of DURKIN).

27 (Mot. to Vacate, Ex. A.) This report and the timing of its production are at the center of the present
28 motion.

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2 **II.**3 **DISCUSSION**

4 Mincoff raises three arguments in support of his Motion to Vacate Conviction and Sentence.
 5 First, he alleges the government suppressed Special Agent Vitkosky's FBI report in violation of
 6 *Brady v. Maryland*. Second, Mincoff claims the Government's suppression of the FBI report
 7 effectively denied him his Sixth Amendment right to confront witness Munoz. Third, Mincoff
 8 contends that if the Government did not improperly suppress the FBI report then his trial counsel was
 9 ineffective in failing to identify and exploit evidence of Munoz's involvement in a conspiracy to
 10 suborn perjury. The Government disputes all arguments.

11 **A. *Brady v. Maryland***

12 Mincoff argues that the Government improperly withheld impeachment evidence: the FBI
 13 report discussing witness Munoz's conspiracy to suborn perjury. Due process requires the
 14 Government to disclose to the defense any evidence favorable to the accused. *Brady v. Maryland*, 373
 15 U.S. 83, 87 (1963). Impeachment evidence that can be used to undermine the credibility of a
 16 government witness is considered favorable to the accused. *United States v. Bagley*, 473 U.S. 667
 17 (1985). Constitutional error occurs where the Government suppresses evidence favorable to the
 18 accused and that evidence was material to the outcome of the trial "such that the defendant was
 19 prejudiced by the suppression." *Bailey v. Rae*, 339 F.3d 1107, 1113 (9th Cir. 2003). Evidence that
 20 witness Munoz undertook subornation of perjury was favorable to the extent it could have been used
 21 to impeach his credibility before the jury.

22 Here, however, there was no *Brady* violation because the Government disclosed the favorable
 23 evidence. *See United States v. Goodwin*, 41 Fed. Appx. 115, 117 (9th Cir. 2002), (citing *United States*
 24 *v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991)) ("There is no suppression where the defendant has
 25 sufficient information to ascertain the *Brady* information on his own."). All of the relevant
 26 information in the FBI report was disclosed to Mincoff in the form of recordings and transcriptions
 27 of phone calls that clearly indicated Munoz participated in a conspiracy to suborn perjury and many
 28

1 other crimes. Among the relevant recordings and transcripts was an intercepted call between Durkin
2 and Munoz on August 16, 2005, in which the following exchange took place:

3 [Munoz]: Well was it on somebody's person? Was somebody
4 carrying it?

5 [Durkin]: Huh?

6 [Munoz]: Was somebody carrying it or did . . . they find it in the
7 car?

8 [Durkin]: Well I don't know. I don't know. Uh . . . they kind of
9 . . . I don't know exactly what happened, you know. I
10 . . . I probably won't know, I, uh . . .

11 [Munoz]: You know who you can talk to . . . you know, you know
12 that name, what's his name, Rick?

13 [Durkin]: Huh?

14 [Munoz]: Ricky? Ricky?

15 [Durkin]: What about him?

16 [Munoz]: You should tell him to suck up and say it was his.

17 (Respondent's Opp'n. to Mot., App. at 20.) The FBI report's only additional mention of the
18 conspiracy to suborn perjury reflects Contreras's actual commission of perjury and suggests no further
19 action by Munoz and no additional grounds for his impeachment.

20 Mincoff cites *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), and argues in effect "the state
21 cannot satisfy its *Brady* obligation to disclose exculpatory and impeachment evidence by making some
22 evidence available and asserting that the rest would be cumulative." *Id.* at 1058. However, in *Benn*
23 the Government actually suppressed evidence and that evidence concerned the witness's history of
24 lying as an informant and perjuring himself as a witness. The Ninth Circuit affirmed the district
25 court's holding that the suppressed evidence revealed the witness to be "completely unreliable, a liar
26 for hire, ready to perjure himself for whatever advantage he could squeeze out of the system." *Id.*
27 (citing *Benn v. Wood*, No. C98-513FDB, 2000 U.S. Dist LEXIS 12741, at *13-14 (W.D. Wash. June
28 30, 2000)).

1 This case is distinguishable from *Benn* on two grounds. First, the Government did not suppress
 2 material evidence. *Bagley*, 473 U.S. at 682. (“[E]vidence is material only if there is a reasonable
 3 probability that, had the evidence been disclosed to the defense, the result of the proceeding would
 4 have been different.”) The exclusion of the FBI report did nothing to affect Munoz’s credibility
 5 because the same information was contained in discovery. Consequently, there is little possibility -
 6 let alone a “reasonable probability” - that disclosing the FBI report would have had any effect on the
 7 outcome of Mincoff’s trial.

8 Second, even if Mincoff had impeached Munoz regarding the conspiracy to suborn perjury,
 9 it would not have substantially changed the jury’s assessment of his credibility. Both the Government
 10 and Mincoff provided the jury with sufficient evidence to assess Munoz’s motives by discussing his
 11 criminal history and the lenient sentence he hoped to receive in exchange for his testimony. The
 12 Government’s closing argument included this admission:

13 Jessie Munoz has pled guilty in this case, and in several others. And
 14 I told you he has admitted to doing a lot of bad things. You can, and
 15 you should, view his testimony with great scrutiny. He is hoping to get
 16 some reduction in sentence maybe, but he also told you he has agreed
 17 to an offense level that is as high as the federal sentencing guidelines
 18 allow.

17 (Respondent’s Opp’n. to Mot., at 19.) Thus, the jury had an accurate picture of factors motivating
 18 Munoz to testify. As discussed, the Government disclosed all favorable information contained in the
 19 report in question.¹ Accordingly, there was no *Brady* violation.²

20 **B. Ineffective Assistance of Counsel**

21 Mincoff next argues that his trial counsel was ineffective in that he failed to impeach Munoz
 22 regarding the above referenced conspiracy. An attorney’s representation violates the Sixth
 23 Amendment right to counsel if two elements are met. *Strickland v. Washington*, 466 U.S. 668 (1984).
 24 First, the attorney’s representation must fall below an objective standard of reasonableness. *Id.* at 688.

27 ¹Absent suppression, the court declines to analyze prejudice.

28 ²Because the Government did not suppress evidence, there is no basis for Mincoff’s claim that
 the suppression of *Brady* evidence effectively denied him the Sixth Amendment right to confrontation.

1 Here the court “must indulge a strong presumption that counsel’s conduct falls within the wide range
2 of reasonable professional assistance.” *Id* at 689. Second, there must be prejudice, *i.e.*, a reasonable
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4 probability that but for counsel’s errors, the result of the proceedings would have been different. *Id.*
5 at 694.

6 Here, it is not reasonably probable that impeaching Munoz regarding a conspiracy to suborn
7 perjury would have changed the result of the proceedings. While such an accusation might reasonably
8 cause jurors to question Munoz’s credibility and the veracity of his testimony, here, Munoz’s
9 credibility was already under attack. Both the Government and Mincoff questioned Munoz about his
10 criminal history and potentially lighter sentence due to his cooperation. Further, an accusation of
11 subornation of perjury would not have materially undermined Munoz’s credibility because his
12 testimony regarding Mincoff was corroborated by clearly inculpatory intercepted telephone calls.
13 Therefore, Mincoff was not prejudiced by his attorney’s failure to question Munoz regarding the
14 conspiracy to suborn perjury. Absent any prejudice, Mincoff did not receive ineffective assistance
15 of counsel.

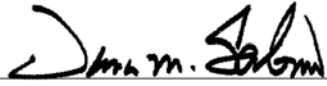
16 **III.**

17 **CONCLUSION**

18 For these reasons, Defendant’s motion pursuant to 28 U.S.C. § 2255 is denied.

19 **IT IS SO ORDERED.**

20 DATED: July 26, 2011

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23 HON. DANA M. SABRAW
24 United States District Judge
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